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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1947**

**No. 590**

**HARRIS KENNEDY, ET AL,**

**Petitioners**

**versus**

**SILAS MASON COMPANY,**

**Respondent**

**On Writ of Certiorari to the United States Circuit  
Court of Appeals for the Fifth Circuit**

**BRIEF OF RESPONDENT**

**CHARLES D. EGAN,**

**Attorney for Respondent**

**LECOMTE, SHREVEPORT, LOUISIANA**



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**BRIEF OF RESPONDENT**

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**INTRODUCTION**

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The decision below (R.251) is reported at 154 Fed.  
(2d) 1016.

The case comes here on writ of certiorari directed  
to the United States Circuit Court of Appeals for the  
Fifth Circuit.

The question involved is whether or not the *Fair Labor Standards Act* (c.676, 52 Stat. 1060, 29 U. S. C., 201-219) applies to petitioners, employees of respondent, operator of an Ordnance Plant under a cost-plus-a-fixed-fee contract with the United States during the late War.

### STATUTE INVOLVED

The provisions of the Fair Labor Standards Act relevant to the issues of this case are as follows:

29 U. S. C., 202 - Congressional-finding and declaration of policy

"(a) The Congress finds that the existence, in industries engaged in Commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is declared to be the policy of sections 201-219 of this title, through the exercise

by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

**29 U. S. C. 203 — Definitions**

As used in sections 201-219 of this title—

- “(b) ‘Commerce’ means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.
- “(d) ‘Employer’ includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State, or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organizations.
- “(e) ‘Employee’ includes any individual employed by an employer.
- “(g) ‘Employ’ includes to suffer or permit to work.
- “(h) ‘Industry’ means a trade, business, industry, or branch thereof, or group of in-

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dustries, in which individuals are gainfully employed.

(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof, other than a producer, manufacturer, or processor thereof.

(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods; or in any process or occupation necessary to the production thereof in any State.

29 U. S. C., 206—Minimum wages; effective dates

"(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates -

(2) during the next six years from such date,  
not less than 80 cents an hour,

- 5
- (3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 208 of this title, whichever is lower.

**29 U. S. C., 207 — Maximum hours**

"(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

- (3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

**29 U. S. C., 215 — Prohibited acts; prima facie evidence**

- "(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206, or section 207 of this title, or in violation of any regulation or order of the Administrator issued under section 214 of this title; \* \* \*

**29 U. S. C., 216 — Penalties; civil and criminal liability**

- "(a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.**
- (b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. \* \* \*"**

**SUMMARY STATEMENT OF THE CASE**

The summary statement contained in petitioners' brief is accepted with the corrections, modifications and additions below.

The record contains no reference to the shipment of munitions to the Nation's Allies.

The statement that respondent shipped the munitions out of the Plant is a conclusion. They were shipped through Government orders as Government property (R. 21), and respondent's only function was the preparation of the munitions for shipment and the loading of the same on carriers. (R. 45).

The statement that respondent purchased the raw materials in the open market does not correctly reflect the facts. The Government supplied all explosives and metal parts for the loading of the munitions, as well as shipping materials and containers. (R. 45, 88). Respondent was at liberty to provide other materials (R. 45, 113), but when it did, the Government took title at the point of purchase. (R. 89, 181). The result was that all material involved was shipped to and arrived at the Plant as Government property. (R. 21).

### SUMMARY OF ARGUMENT

The controlling facts are contained in the affidavit of R. L. Telford in support of the motion for summary judgment (R. 20, 21) and in the provisions of the contract under consideration. (R. 22-218).

The contract (R. 22-218) provided for the construction and operation under Government direction by respondent.

ent of a plant located upon a Government reservation and devoted to the loading of munitions. Component parts of the loaded products and all equipment used or consumed in the process were Government supplied. The amount and type of munitions loaded, the number of respondent's employees, their hours of work and rates of pay were matters for Government determination. The finished product, as Government property, was transported to the fighting forces as the Army directed. Respondent was reimbursed for all expenditures, guaranteed against financial loss as a result of its commitments and paid a fixed fee for its services. Relevant provisions of the contract include the following:

- (1) The Plant is to be used for the loading of munitions. (R. 25, 26, 111, 148, 172).
- (2) Respondent is obligated to operate the Plant as directed by the Government's representative, the Contracting Officer. (R. 44).
- (3) In consideration of its undertaking respondent shall be reimbursed for its expenditures and receive a fixed fee for its services. (R. 47).
- (4) When directed by the Contracting Officer, respondent is obligated to reduce its overhead and/or personnel, or increase the workdays per week, or hours of labor per day. (R. 34).
- (5) The Government is to furnish all component

parts for the loading of munitions. (R. 45, 88).

- (6) No person shall be employed by respondent in certain named supervisory capacities without the approval of the Contracting Officer. (R. 58).
- (7) Funds necessary for the operation of the Plant are to be furnished respondent by the Government in the form of an interest free revolving fund. (R. 64, et seq.).
- (8) The operation of the Plant shall be at the expense of the Government, and the Government shall hold respondent harmless against any loss, expense, or damage of any kind arising out of, or in connection with, such operation. (R. 70, 71). Although this hold-harmless provision would cover judgments obtained in cases such as the instant case, there is a subsequent stipulation specifically providing for reimbursement of such judgments. (R. 181).
- (9) Title to all work completed, or in the course of construction, preparation or manufacture shall be in the Government. (R. 73). Subsequent modifications of the Title provision (R. 89, 181) to provide that the Government might take title to equipment at points of origin did not alter the basic fact that title to all property involved was in the Government.
- (10) Title to all material, tools, machinery, equipment or supplies, for which respondent is entitled to reimbursement, shall vest in the Government at such point as the Contracting Of-

ficer shall designate in writing. (R. 89, 181). This refers to material not furnished direct by the Government but purchased by respondent under the provisions of the contract appearing at Pages 45 and 118 of the Record.

- (11) Respondent is obligated to keep at the site of the work a representative to receive and execute the directions of the Contracting Officer. (R. 76).
- (12) The Contracting Officer may require respondent to dismiss any employee deemed by the Contracting Officer to be incompetent or whose retention is considered not to be in the public interest. (R. 76). A dismissal under this provision may be the subject of an appeal under the dispute clause referred to in (13) below.
- (13) Disputes arising under the contract are decided by a Board appointed by the Secretary of War to which appeals are taken in the manner prescribed by the Board. (R. 79, 133).
- (14) Respondent's notes and other data concerning design, construction and equipment of the Plant become Government property. (R. 35).
- (15) The Government reserves the right to pay directly to the persons concerned all sums due by respondent for labor, materials and other charges. (R. 60, 89).
- (16) No purchase in excess of \$500 may be made and no subcontract entered into by respondent

without the approval of the Contracting Officer. (R. 75, 76).

- (17) Respondent is reimbursed for all costs of reworking rejected materials and materials finally rejected. (R. 54).
- (18) The contract is subject to termination in whole or in part at the will of the Government. (R. 68, 120).

The factual situation resulting from the operation of the contract is set forth in the Telford affidavit, reading in relevant part:

"That Silas Mason Company constructed and later operated the Louisiana Ordnance Plant under the terms of a contract with the United States of America, a copy of which is filed in the proceeding hereinafter mentioned. (this proceeding).

That at all times involved in the complaint of complainants in the proceeding just above mentioned, the premises upon which complainants were employed, the tools and equipment which they were using in their employment, and the property and products with which they dealt in such employment, were all the property of, and belonged to, the United States Government; that the component parts of the shells, grenades, mines, fuses, bombs, and other products with which all of the complainants dealt were shipped to the Louisiana Ordnance Plant as property of the Government and the finished product, as property of the Government, was, by its direction, shipped out of the said premises for use by its Armed Forces in its War effort in the War with Germany, Japan, Italy, and other Nations." (R. 20, 21).

Factual findings of the Court below (embodied in a statement containing certain legal conclusions) were:

"The United States was engaged in a war which challenged the very life of the Nation. The defendant was called in and entered into a contract with the Government to construct for it an ordnance plant at Shreveport, Louisiana; and when such plant was erected, to manufacture munitions of war for the Government. The Government owned the land upon which the ordnance plant was built; it owned the plant; it owned the equipment and the materials which went into the manufacture of the munitions; and when such munitions were finished and ready for use, they were stored in plants and buildings which belonged to the Government, or went immediately to the firing line to be there used by the troops. These munitions never at any time went into or became a part of commerce as defined by the Fair Labor Standards Act. They were not manufactured for sale, nor were they ever intended or used for commercial purposes. The Mason Company had no interest, financial or otherwise, in the shipment, destination, or delivery of these munitions. It sold nothing in interstate commerce; it delivered nothing in interstate commerce; and it shipped nothing in interstate commerce except as an agent or instrumentality for the loading of munitions which already belonged to the United States."

In the light of the contract provisions and the undisputed facts set forth in the Telford affidavit and summarized in the above quotation from the opinion below, respondent contends:

- (1) Interstate transportation by the Government of Government owned munitions for use by its Armed Forces is not "commerce" within the meaning of the Fair Labor Standards Act.
- (2) The Act is inapplicable to the litigants as the enterprise in which they were engaged was that of the Government, their activities related to War, not commerce, and respondent was an agent or instrumentality of the Government in the employment of petitioners and the operation of the Plant.
- (3) The munitions involved were not "goods" within the definition of Section 3 (i) of the Act because of the exclusionary provision relating to goods in the hands of the ultimate consumer.

### ARGUMENT

Three fundamental fallacies permeate the argument contained in petitioners' brief.

The first is the assumption that respondent carries the burden of proving an exemption from the Act. This would only be true if respondent admitted that the Act was applicable to its activities and asserted that petitioners were exempt under Section 13. The burden of proof here is on petitioners. (*Warren-Bradshaw Company v. Hall*, 317 U. S. 88, 87 L. Ed. 83).

The second is the assumption that an affirmance of the Circuit Court decision would exclude all employees of contractors with the Government from the benefits of

the Government's general labor policy. Overlooked here is the fact that the Fair Labor Standards Act applies to many employees of contractors with the Government. Overlooked also are such Acts as *Walsh-Healey* (49 Stat. 2036-2039, 41 U. S. C., 35-45) and *Bacon-Davis* (37 Stat. 726, 40 U. S. C., 321-325) which under ordinary circumstances cover practically the entire field of Government contracts.

The third is the assertion that the Court should retroactively read the mind of the Congress which met in 1938 and decide whether that Congress, had it anticipated the late War and the terms of the contract under consideration, would have included petitioners within the coverage of the Act.

There is no inherent right to the benefits of the Act and its provisions can be invoked only by those to whom its coverage extends. The benefits of the Act are in the nature of special privileges conferred by the Congress upon those persons, and those persons only, to whom the Act is applicable. The Court is not concerned with the wisdom or even the fairness of either the inclusion or exclusion of any particular litigant or group of litigants. The litigants and the Court must take the Act as they find it. The contention that petitioners should receive the benefits of the Act because it applies to others engaged in somewhat related activities addresses itself to the Congress and not to the Court.

Prefacing our argument with the request that the Court bear in mind throughout its consideration of this

case the plain Congressional intent to exclude the Government from the terms of the Act (Sec. 3 (d) ), we now turn to a discussion of our three above listed contentions, each of which was sustained below, and any one of which if sustained here will result in an affirmance.

**INTERSTATE TRANSPORTATION BY THE GOVERNMENT OF GOVERNMENT OWNED MUNITIONS FOR USE BY ITS ARMED FORCES IS NOT "COMMERCE" WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT.**

**(a) The Transportation Involved Was an Administrative Act of The Sovereign.**

Petitioners have never contended that they were engaged in "commerce", but have based their case upon the assertion that they were engaged in the "production of goods for commerce". The "goods" produced were munitions loaded at the Louisiana Ordnance Plant. The claim that these "goods" were "produced for commerce" rests upon the fact that the Government in its fight for survival transported its munitions across State lines.

The Act is made inapplicable to the United States by the exclusion contained in the definition of "employer" in Section 3 (d). We emphasize the fact that petitioners can invoke the Act only if it applies to interstate transportation of Government owned munitions in time of War and point out that such shipments are not commercial transactions, but administrative acts of the Government.

In the absence of a decision by this Court we call attention to the fact that shipments of the type under con-

sideration are regarded as administrative acts of the Government by the weight of Circuit Court opinion.

In addition, to the holding of the Fifth Circuit in the instant case and in *St. Johns River Shipbuilding Company v. Adams*, 164 Fed. (2d) 1012, there are decisions by the Second, Fourth, Seventh, Ninth and Tenth Circuit Courts.

The Ninth Circuit held in *NLRB vs. Idaho-Maryland Mines Corporation*, 98 Fed. (2d) 129, and reiterated in *Fox vs. Summit King Mines*, 143 Fed. (2d) 926, that interstate shipments of Government owned gold and silver were administrative acts of the Government and not such commercial transactions as to fall within the purview of the National Labor Relations Act.

The Second Circuit in *Divins vs. Hazeltine Electronics Corporation*, 163 Fed. (2d) 100, held that battleships, aircraft carriers and submarines were instrumentalities of war and not of commerce, and that the Fair Labor Standards Act does not apply to persons repairing or servicing the equipment of such ships, in spite of the fact that the operation of the ships by the United States literally complied with the statutory definition of commerce in the Act.

The Fourth Circuit in *Walling vs. Haile Gold Mines*, 136 Fed. (2d) 102, reversed a District Court decision holding the Fair Labor Standards Act inapplicable to a shipment of gold. The reversal was not based upon a conflicting view of the legal principles involved, but upon a factual

finding by the Circuit Court that title to the gold transported did not vest in the Government until the conclusion of the interstate shipment. The decision applying the Act to defendant was based squarely upon a holding that gold was transported by the defendant and not by the Government, and it is apparent that if title had vested in the Government prior to the interstate shipment the Court would have held the Act inapplicable.

The Tenth Circuit in *Clyde vs. Broderick*, 144 Fed. (2d) 348, reversed a District Court decision that the Fair Labor Standards Act was inapplicable to a shipment of property to a Government owned plant. The reversal, however, was based on a factual finding that the goods shipped were owned by a private contractor and not by the Government. The Circuit Court did not question the conclusion of the Court below that the Act does not apply when Government owned property is shipped interstate.

The Seventh Circuit in *Bell vs. Porter*, 159 Fed. (2d) 117, expressed the opinion that interstate transportation of Government owned munitions constituted "commerce" within the meaning of the Fair Labor Standards Act. The expression of opinion was dicta in view of the rejection of the claimant's demands on other grounds; *Clyde vs. Broderick*, *supra*, is cited as a result of an apparent misunderstanding of the holding, and it does not appear that the gold cases above mentioned were called to the Court's attention.

Summarizing, we find that the contention that in-

terstate shipment of Government owned munitions is not a commercial transaction, but an administrative act of the Government, finds direct support in decisions of the Second, Fifth and Ninth Circuits, inferential support in decisions of the Fourth and Tenth Circuits, and is questioned only by the dictum contained in a decision of the Seventh Circuit.

The contention under consideration also finds support in the decision of this Court in *United States vs. United Mine Workers of America*, ——— U. S. ———, 91 L. Ed. 595, to the effect that Government operation of coal mines is the exercise of a Sovereign function. Obviously the fundamental concept of Sovereignty is more apparent in the production and transportation of munitions in time of war than in the operation of coal mines in time of peace.

(b) The Policy Of The Act Has No Application To Such Transportation.

- (1) Neither the power exercised nor the declared policy of the Act is relevant to such transportation.

In *United States vs. American Trucking Associations*, 310 U. S. 534, 84 L. Ed. 1345, the Court used the following language in referring to its function in the interpretation of Statutes:

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress."

It is our conviction that the problem of interpretation presented by the instant case is easily resolved in view of the provisions of Section 2 of the Act. In Section 2 (a) the Congress declares that it finds "the existence in industries engaged in commerce or in the production of goods for commerce", of labor conditions which produce five enumerated evils. In Section 2 (b) it is declared to be the policy of Congress to correct these evils through the exercise of its power to regulate commerce among the several States.

We submit that a consideration of whether or not the Act is applicable to the facts presented by the instant case begins and could well end with an examination of the limited power exercised by the Congress in the passage of the Act.

The language of Section 2 (b) is practically identical with *Clause 3, Section 8, Article 1 of the Constitution of the United States*.\* The Congress has declared that it acted under a specific provision of the Constitution (although it did not exercise its full power under such provision). The constitutional provision in question authorizes Congress to regulate the commerce of the citizens of the several States; that is, to regulate the commerce

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\* The constitutional clause confers upon Congress the power "to regulate commerce with foreign nations and among the several States, and with the Indian Tribes". The language of the Act relevant to this comparison is " \* \* through the exercise by Congress of its power to regulate commerce among the several States".

of the grantors of the power, not the activities of grantee. (*South Carolina vs. Georgia*, 93 U. S. 10, 23 L. Ed. 782).

Had Congress sought to regulate the activities of the United States itself there would have been no need to invoke the commerce clause of the Constitution. The *Walsh-Healey Act*, 41 U. S. C., 35-45, is an example of the regulation by Congress of the hours and wages of employees of Government contractors in which there is no exercise of, or reference to, Congressional power to regulate interstate commerce. The regulation of its own acts is an inherent right of the Government; not a right under the delegated power to regulate commerce. Specific power with reference to the waging of war and the raising and supporting of an army is derived from *Clauses 11 and 12, Section 8, Article 1 of the Constitution*. The fact that Congress based the Fair Labor Standards Act upon power delegated to it by the people of the several States to regulate the commerce of the grantors is conclusive evidence of the limitation of the purpose and scope of the Act to activities falling within the limits of the delegated power.

Even if Congress had not declared that the Act was passed as a result of the exercise of a power too restricted to include the transportation of munitions it is apparent from the Congressional findings and declaration of policy contained in Section 2 (a) that the Congress did not intend the Act to apply to the facts presented by the instant case.

The provisions of Section 2 show that Congress

intended to regulate "commerce" and through the regulation of commerce to regulate "transportation" in the restricted sense of trade, traffic and *competition* by and between the citizens of the Nation, not to regulate Government shipment of Government owned munitions in time of war.

The evils which Congress sought to correct were found to exist "in industries engaged in commerce or in the production of goods for commerce". Government activities at any time, and particularly in time of war, do not fall within any accepted definition of "industry" and certainly not within the definition contained in Section 3 (h), reading:

" 'Industry' means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed."

The five effects of the existing labor conditions which it was the declared Congressional purpose to correct have no relation to the loading and transporting of Government owned munitions under the facts reflected by this record. The attainment of the ends of Government social policy does not require legislative compulsion when the Government pays the bill. Inherent in the Congressional declaration of policy is the legislative purpose to regulate "industry" through the exercise of the constitutionally authorized control of "commerce" in the restricted sense of competitive "transportation". This purpose has no application to the factual situation presented by this record.

- (2) General legislation of the type under consideration is inapplicable to the Sovereign.

Even in the absence of specific exclusion of the Government (Sec. 3 (d) ) the Act could not be interpreted to include it, in view of the principle that general legislation does not include the Sovereign in the absence of an express reference or an unavoidable implication. This principle is stated in *United States vs. Hoar, 2 Mason 311*, in the following language:

"Where the Government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischief to be redressed or the language used, that the Government was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the Government itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law that the general words of a statute ought not to include the Government or effect its rights unless that construction is clear and indisputable upon the text of the Act."

To the same effect see *Dollar Savings Bank vs. United States, 36 U. S. 227, 22 L. Ed. 80*.

- (3) The purpose of the Act is to regulate "commerce" in the restricted sense of trade, traffic and competition.

It seems apparent that the Congress charged with

the knowledge that general legislation does not include the Government under ordinary circumstances, acting by its own declaration under a restricted power which did not include Government transportation of Government owned articles and acting in order to cure the evils enumerated in Section 2 (a) of the Act, could not possibly have intended to regulate transportation by the Government of Government owned munitions. In view of the declaration of policy, the specific exclusion of the Government and considering the general principles of interpretation involved, it is obvious that the word "transportation" in the definition of "commerce" in Section 3 (b) relates to industrial and not to Governmental shipments.

Petitioners' contention that *Executive Order 9301* and the *Portal-to-Portal Act of 1947 (Public Law 49, 80th Congress Chap. 52)* indicate a contrary Congressional intention is not impressive. The fact that Executive Order 9301, which related to all industry, did not purport to suspend or modify the Fair Labor Standards Act is irrelevant to the problem under consideration. The argument based on the Portal Act ascribes to Congress the function of interpretation which the Constitution vests in the Court.

As previously mentioned, the Congressional declaration of policy found that the existence "in industries engaged in commerce or in the production of goods for commerce" of certain conditions produced enumerated evils and the Act was passed to cure these evils. It seems

apparent that in the passage of the Act Congress had in mind the definition of "commerce" contained in the opinion of this Court in *Carter vs. Carter Coal Company*, 298 U. S. 238, 80 L. Ed. 1160:

"As used in the Constitution the word 'commerce' is the equivalent of the phrase 'intercourse for the purpose of trade', and includes transportation, purchase, sale and exchange of commodities between citizens of a State." \*

As stated, the Act itself shows that Congress intended to regulate "commerce" in the restricted sense of trade, traffic and competition by and between the citizens of the Nation and not to regulate Government shipment of Government owned munitions under the circumstances reflected by the facts of this case. This Court has often pointed out that Congress did not intend to extend the regulations contained in the Fair Labor Standards Act to the furthest reaches of Federal authority. *Kirschbaum Company vs. Walling*, 316 U. S. 517, 86 L. Ed. 1638; *Walling vs. Jacksonville Paper Company*, 317 U. S. 564, 87 L. Ed. 460; *McLeod vs. Threlkeld*, 319 U. S. 491, 87 L. Ed. 1538.

Congressional intention to regulate commerce in a competitive sense is emphasized by the references to competitive conditions contained in Section 8 of the Act relating to wage orders established by industrial committees.

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\* For a scholarly discussion of the historical development of this definition see *Young vs. Kellogg Corporation*, 14 C. C. H. Labor Cases 64,244 (D.C.E.D. Tenn.), holding the Act inapplicable to the production of the atomic bomb.

In its operations at the Louisiana Ordnance Plant respondent was not engaged in *competition*. The cost of the labor and material utilized in complying with its contractual obligations was a matter of indifference to respondent and it did not own or sell the munitions.

A number of decisions of the Court emphasize the fact that the Act regulates commerce in the *competitive* sense.

In *United States vs. Darby*, 312 U. S. 100, 85 L. Ed. 609, the Court said:

"The Fair Labor Standards Act set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act. Its purpose, as we judicially know from the declaration of policy in Sec. 2 (a) of the Act, and the reports of Congressional committees proposing the legislation, S. Rept. No. 884, 75th Cong. 1st Sess.; H. Rept. No. 1452, 75th Cong. 1st Sess.; H. Rept. No. 2182, 75th Cong. 3d Sess., Conference Report, H. Rept. No. 2738, 75th Cong. 3d Sess., is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of *competition* in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the work-

ers of the several states." (emphasis supplied).

.....

"The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of *competition* in the distribution of goods produced under substandard labor conditions, which *competition* is injurious to the commerce and to the states from and to which the commerce flows." (emphasis supplied)

.....

"As we have said the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for *competition* by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by *competition* made effective through interstate commerce. The Act is thus directed at the suppression of a method or kind of *competition* in interstate commerce which it has in effect condemned as 'unfair', as the Clayton Act has condemned other 'unfair methods of *competition*' made effective through interstate commerce." (emphasis supplied)

.....

"Congress, to attain its objective in the suppression of nation-wide *competition* in interstate commerce by goods produced under substandard labor conditions, \* \* \*." (emphasis supplied)

See also *Brooklyn Savings Bank vs. O'Neil*, 324 U. S. 697, 89 L. Ed. 1296; *Mabee vs. White Plains Publishing Company*, 327 U. S. 178, 90 L. Ed. 607; and *Roland Electric Company vs. Walling*, 326 U. S. 657, 90 L. Ed. 383.

Interpreting the Act the Court has referred to the President's message to Congress in May of 1937, 81 Cong. Rec. 4960, as a result of which the Act was passed. (*Roland Electric Company vs. Walling*, *supra*). Two passages from this message emphasize our contention that the Act was intended to regulate industry in its competitive phase and not the Sovereign acts of the Government.

"Enlightened business is learning that competition ought not to cause bad social consequences, which inevitably react upon the profits of business itself."  
(emphasis supplied)

\* \* \* \* \*

"With the establishment of these rudimentary standards as a base, we must seek to build up, through appropriate administrative machinery, minimum wage standards of fairness and reasonableness, industry by industry, having due regard to local and geographical diversities and to the effect of unfair labor conditions upon competition in interstate trade and upon the maintenance of industrial peace."  
(emphasis supplied)

- (4) Decisions of this Court stating the purposes of the Act show that it is not applicable to such transportation.

In addition to pointing out in the *Darby Case*, *supra*, that the Act under consideration was intended to

regulate commerce in the restricted sense of trade and competition this Court has in subsequent decisions pointed out three other purposes of the Act:

- (1) Through the overtime provision to apply financial pressure to employers to spread employment in order to avoid the extra wages. (*Overnight Motor Transport Company vs. Missell*, 316 U. S. 572, 86 L. Ed. 1682; *Southland Gasoline Company vs. Bagley*, 319 U. S. 44, 87 L. Ed. 1244; and *Walling vs. Helmerich & Payne, Inc.*, 323 U. S. 37, 89 L. Ed. 29).
- (2) To protect certain groups of the population from substandard wages and excessive hours. (*Brooklyn Savings Bank vs. O'Neil*, *supra*; *Schulte vs. Gangi*, 323 U. S. 103, 90 L. Ed. 1114).
- (3) To prevent that segment of the population which is without a strong bargaining power from making private contracts which endanger its health and efficiency. (*Brooklyn Savings Bank vs. O'Neil*, *supra*).

All are inapplicable to the facts of the instant case, the first because of the man power shortage which prevailed during the War effort, the second because of high wages in War plants and Government control of hours of work in this case and the third because the Government paid the wages and controlled the hours of work.

If the Act is held applicable and judgment should go against respondent on the merits the judgment will in the end be paid by the Government. (R. 70, 71, 181). We

would thus have the anomalous situation of the Government imposing a penalty upon itself for failure to comply with a social policy of its own creation.

**THE ACT IS INAPPLICABLE TO THE LITIGANTS AS THE ENTERPRISE IN WHICH THEY WERE ENGAGED WAS THAT OF THE GOVERNMENT, THEIR ACTIVITIES RELATED TO WAR, NOT TO COMMERCE, AND RESPONDENT WAS AN AGENT OR INSTRUMENTALITY OF THE GOVERNMENT IN THE EMPLOYMENT OF PETITIONERS AND THE OPERATION OF THE PLANT.**

**(a) The Enterprise Was That Of The Government.**

"Industry" is not involved in a situation where the Government in the emergency of war employed a contractor to build and operate upon property owned by it a plant for the loading of munitions composed of its own materials. Particularly is this true where the Government determines the type and amount of the munitions to be loaded, ships the finished product for use in its war effort, supplies all funds necessary to pay the employees in the plant, retains a veto power over the employment of individuals, determines the number of employees to be engaged, their hours of work and rates of pay,\* and assumed all financial risk involved. Viewed in the light of the obligations and retained powers of the Government under the contract, it

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\* The statement on page 12 of Petitioners Brief implying that the Government did not control wages or salaries of petitioners finds no support in the opinion below and ignores the contract provisions at pages 51 and 52 of the record.

is apparent that the enterprise was that of the Government and that respondent's function was limited to management, under close Government supervision, of a Government owned plant operated by the Government through the exercise of its war powers.

Since the Act relates to "industry" and excludes the Government (Sec. 3 (d) ) it is apparent that the "transportation" regulated through the definition of "commerce" (Sec. 3 (b) ) <sup>1</sup> is industrial, not Governmental, transportation.

**(b) The Activities Of The Litigants Related To War, Not Commerce.**

The activities of the litigants constituted an integral part of the War machinery. Their work dealt exclusively with munitions, which are articles of war not of commerce. Respondent under direct Government supervision exercised managerial functions and petitioners' work was performed in that branch of the War effort centered at the Louisiana Ordnance Plant.<sup>2</sup>

Petitioners' hours of work, rates of pay, period of

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<sup>1</sup> "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

<sup>2</sup> In a similar situation the Second Circuit Court in *Divins vs. Hazeltine Electronics Corporation*, *supra*, has held that workmen repairing aircraft carriers, battleships and submarines were engaged in the War effort and not in commerce.

employment and the product upon which they worked depended, not upon commercial considerations or any decision of respondent, but upon directions issued by the Army in furtherance of the National War effort.

As the Fifth Circuit Court stated in *St. Johns River Shipbuilding Company vs. Adams, supra*:

"War is not commerce. There can be commerce in war equipment but when the Government itself in the midst of war has produced for immediate use in war at its own expense and in its own shipyards special type vessels as auxiliaries for its navy and to be manned by navy crews, commerce is not involved at all. The Company and its employees knew it was not. The war power of the federal government is its supreme power. When it is in action it is transcendent."

The fact that "commerce" in the restricted sense of trade may be stimulated in time of war is irrelevant to a consideration of the status of persons engaged directly in the Government's War effort.

(c) Respondent Was An Agent Or Instrumentality Of The Government In The Employment Of Petitioners And The Operation Of The Plant.

It is apparent that respondent was the mere agent or instrumentality of the Government, and that under such circumstances the Act is inapplicable because of the Government's immunity under Section 3 (d).

The holding in *Alabama vs. King & Boozer*, 314 U. S. 1, 86 L. Ed. 3, and *Curry vs. United States*, 314 U. S.

14, 86 L. Ed. 9, that Government cost-plus-a-fixed-fee contractors are without right to pledge the credit of the United States does not mean that such contractors cannot be agents or instrumentalities of the Government. It is not necessary that one have the authority to pledge the credit of his principal in order to occupy the status of an agent. *Pennsylvania Dairies vs. Pennsylvania Milk Control Commission*, 318 U. S. 261, 87 L. Ed. 748, is irrelevant to consideration of the question of agency.

The contention that *Alabama vs. King & Boozer* *supra*, is relevant because of its holding that a State may tax sales to a cost-plus-a-fixed-fee contractor notwithstanding the fact that the economic burden of the tax is borne by the United States lacks force in view of the holding in *United States vs. County of Allegheny*, 322 U. S. 172, 83 L. Ed. 1209, the rationale of which is that if a tax levied upon such a contractor imposes a burden upon the Government, it violates the constitutional immunity.\*

It is contended that the contract contains language the effect of which is to designate respondent as an independent contractor. The answer of the District Court (approved by the Circuit Court) to this contention was to look through forms and consider substance. (R. 232). In so looking the District Judge appears to have anticipated the decision of this Court in *Rutherford Food Corporation*

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\* It should also be pointed out that Congress could not in 1938 have had in mind the *Alabama vs. King & Boozer* decision which was rendered in 1941.

*vs. McComb*, — *U. S.* —, 91 L. Ed. 1350, in which the label of "independent contractors" was ignored and the Act applied in view of the factual situation reflected by the record. The Rutherford decision is applicable here and the labeling of an agent as "independent contractor" cannot serve to make him such although the result here will be the opposite of the Rutherford Case—in that here coverage of the Act will be denied.

There are numerous definitions of "independent contractor", all of which are substantially the same. From 27 *Am. Juris.* 486, we take the following:

"The most important test in determining whether a person employed to do certain work is an independent contractor or a mere servant is the control over the work which is reserved by the employer. Whether one is an independent contractor depends upon the extent to which he is, in fact, independent in performing the work. Broadly stated, if the contractor is under the control of the employer, he is a servant; if not under such control, he is an independent contractor."

Here complete control was vested in the Government and respondent does not qualify as an independent contractor under the above test for the following reasons:

- (1) Respondent was required to operate the Plant as directed by the Government. (R. 44).
- (2) Respondent was obligated to keep at the site a representative to receive and execute the directions of the Government. (R. 76).

- (3) Respondent was reimbursed for its expenditures and held harmless against loss. (R. 47, 70, 71).
- (4) The Government supplied all required material. (R. 45, 88).
- (5) The Government exercised a veto power over the employment of supervisory personnel. (R. 53).
- (6) The Government retained the power to require respondent to reduce its overhead and/or personnel and to increase the hours of work. (R. 34).
- (7) The Government retained the power to require dismissal of employees. (R. 76).
- (8) Respondent's notes and data became Government property. (R. 35).
- (9) Purchases in excess of \$500 and all subcontracts required Government approval. (R. 75, 76).
- (10) The Government, not respondent, paid the cost of reworking faulty material and of material finally rejected. (R. 54).
- (11) The Government reserved the right to pay directly sums due for labor, materials and other charges. (R. 60, 89).
- (12) The contract is subject to termination in whole or in part at the will of the Government. (R. 68, 120).

Respondent's position bore no relation to that of the

true independent contractor who produces a product at a fixed price and is responsible only for the result.

Petitioners cite decisions by this Court holding that isolated contractual provisions similar to certain ones appearing in the contract under consideration are inconsistent with the agency relationship.. No decision is cited, or can be cited, holding that the total retained powers of the Government here do not create an agency relationship between it and respondent.

In *NLRB vs. Atkins & Company*, — U. S. —, 91 L. Ed. 1157, this Court made the following observation with reference to the employer-employee relationship:

"That relationship may spring as readily from the power to determine wages and hours of another, coupled with the obligation to bear the financial burden of those wages and the receipt of the benefits of the hours worked, as from the absolute power to hire and fire, or power to control all the activities of the worker."

The relationship of the United States to petitioners meets every test laid down in the foregoing quotation and some additional ones. The Government had the power to determine the wages and hours of petitioners, the obligation to bear the financial burden of petitioners' wages, and it received the benefits of the hours worked. In addition the Government had the power to fire and to control the activities of petitioners.

There are more discernible incidents of the employer-employee relationship between the Government and pe-

petitioners than there were between the Government and the coal miners in *United States vs. United Mine Workers, supra*.

(d) **Answer To The Contention That Respondent Did Not Disclose Its Principal.**

Petitioners contend that there is no showing that they knew the United States or the War Department was involved and that the agency was undisclosed. Our reply to this contention is (a) not being an assigned error it cannot be urged (*Supreme Court Rule 27, Subsection 6*); (b) it assumes a fact neither proven nor discussed; (c) it ignores the references to the contract in the complaint filed by petitioners. (R. 2, 3).

**THE MUNITIONS INVOLVED WERE NOT "GOODS" WITHIN THE DEFINITION OF SECTION 3 (1) OF THE ACT BECAUSE OF THE EXCLUSIONARY PROVISION RELATING TO GOODS IN THE HANDS OF THE ULTIMATE CONSUMER.**

The definition of "goods" is repeated for convenience in considering the above contention.

"'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

(29 U. S C., 203 (i) )

The decision below on the point under consideration finds support in the decisions of the Second Circuit in *Divins vs. Hazeltine Electronics Corporation*, *supra*, and of the Eighth Circuit in *Crabb vs. Weldin Bros.*, 164 Fed. (2d) 797. We are aware of no Circuit Court decision in conflict with the principle here asserted.

The material upon which petitioners worked was at all stages of its processing Government property, located upon Government property and subject to Government supervision. Both respondent and petitioners were powerless to deal with the component parts or finished product except as directed by the Government. Our discussion of this phase of the case assumes, as the Court below in effect found, that the Government's actual physical possession of all materials involved and of the finished product at all relevant times is an incontrovertible fact. As pointed out in *United States vs. County of Allegheny*, *supra*:

"The 'Government' is an abstraction and its possession of property largely constructive. Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor."

Petitioners' contentions in respect to the assertion presently under consideration overlook certain conclusions which are inescapable in view of the above quoted definition of "goods" and the penal provisions of the Statute.

"Goods" as defined is not limited to the final pro-

duct but includes "any part or ingredient thereof". The work of petitioners consequently was performed upon material which was already in the actual physical possession of the "ultimate consumer" and, therefore, by the terms of the Act not "goods".

Any contention that either respondent or the Government was a producer or processor of the finished product resulting in the munitions becoming "goods" within the definition of Section 3 (i) is based on a misconception of the meaning of the exclusionary clause. It is submitted that only the producer or processor who consumes commodities in the production, preservation or transportation of *other* commodities is excluded from the classification of "ultimate consumer" by the language of Section 3 (i). From this it follows that a producer of commodities, who is also their consumer, but does not consume them in the production of "goods" is as much the "ultimate consumer" of the component parts and the finished product as one to whom he sells the finished product.

Any attempt to demonstrate that the munitions were "goods" as defined in Section 3 (i) because they were processed at the Plant impales its proponent on one horn of a two horned dilemma. The Government's "actual physical possession" of the materials is an incontrovertible fact. Either the Government processed the munitions, or it did not. If the Government processed the munitions, it did so through the agency of respondent, and the "agency defense" previously discussed is valid. If the Government

did not process the munitions, they were not "goods" within the meaning of Section 3 (i).

The contention that the exclusionary provision of Section 3 (i) was designed for the sole purpose of immunizing the innocent shipper of goods produced in violation of Section 15 overlooks the fact that by the terms of Section 16 it is only the *willful* violation of Section 15 which subjects a shipper to the penalties provided by the Act. The possibility of the use of injunctive process against the ultimate consumer seems too remote to have been within the legislative contemplation.

The fact that the munitions were in the "actual physical possession" of the Government, "the ultimate consumer thereof" within the meaning of Section 3 (i), at the time of their interstate transportation cannot be denied. It is, therefore, apparent that the munitions at the time of their transportation were not "goods" within the meaning of the Act. From this it follows that under the facts of this case the processing of the munitions did not constitute "production of goods for commerce" within the meaning of Sections 6 and 7 of the Act. The principle just announced would also apply to munitions privately processed and sold to the Government at the plant gate.

We feel that the reasons assigned in *Barksdale vs. Ford, Bacon & Davis*, 70 F. Supp. 690, for concluding that munitions are not "goods" are persuasive and we therefore quote as follows:

"Thus the plaintiff was at all times working on

goods of the Government, with machines of the Government, and on Government property, the title to which and the possession of which remained in the United States at all times. After these goods were worked on by the plaintiff, the United States shipped the same under Government bill of lading to military facilities outside of the State. If it can be said that the goods were in the constructive rather than the physical possession of the Government while they were being processed, they were certainly in the actual physical possession of the Government when they were shipped. The goods in question were munitions of war and were manufactured for the purpose of being consumed by the United States in the prosecution of the war. Hence the United States in our opinion was the ultimate consumer thereof within the meaning of the Act, and the plaintiff was not engaged in the 'production of "goods" for commerce'."

The argument that some of the munitions may have reached our Allies finds no support in the record. The suggested remand to take evidence on this point would serve no purpose as neither respondent nor petitioners, upon whom the burden of proof would lie, could possibly hope to trace into the hands of our Allies specific bombs and shells which as property of the Government were, by its direction, originally shipped to its Armed Forces.

It is submitted that the judgment of the Court of Appeals is correct and should be affirmed.

Respectfully submitted,  
 CHARLES D. EGAN  
 Attorney for Respondent.